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R v Sparrow

Kent McNeil
Osgoode Hall Law School of York University, kmcneil@osgoode.yorku.ca

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Ronald Edward Sparrow (Appellant)
v
Her Majesty The Queen (Respondent)

[Indexed as: **R v Sparrow**]

Indigenous Nations Court, *McNeil J*,* *May 1*, *2020*

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On appeal from the Supreme Court of Canada.

In 1984, Ronald Sparrow was charged under the federal *Fisheries Act* with fishing in the Fraser River in British Columbia with a drift net longer than permitted by the Musqueam First Nation's food fishing licence. He admitted to fishing with such a net, but raised s 35(1) of the *Constitution Act, 1982*, as a defence. As a member of the Musqueam Nation, he claimed that he has an Aboriginal right, protected by that subsection, to fish for food, and that the restriction on net length interferes with this right and is therefore invalid.

Mr. Sparrow was convicted at trial in the Provincial Court, and this verdict was upheld by the County Court of Vancouver. The British Columbia Court of Appeal set aside the conviction, deciding that the appellant has an Aboriginal right to fish for food that is protected by s 35(1). However, as the appeal judges also decided that the right could still be regulated by federal legislation, if necessary for conservation, they sent the case back to trial so more evidence could be led on whether the restriction on net length was necessary for this purpose. The Supreme Court of Canada agreed, dismissing the appeal and ordering a new trial. The Supreme Court also laid down a test for justifiable infringement of Aboriginal rights that could be applied by lower courts. Mr. Sparrow appealed this decision to the Indigenous Nations Court.

Held: Appeal allowed and acquittal entered.

1. The Musqueam people have fished for food, societal, and ceremonial purposes within their traditional territory, which includes the stretch of the Fraser River where Mr. Sparrow was fishing, for at least 1500 years and probably much longer. They have always had laws governing resource harvesting, including fishing, that respect the natural world and ensure sustainable use of resources.
2. Prior to the arrival of Europeans in the late eighteenth century, the Musqueam were a sovereign people. Their sovereignty was not lost as a result of European "discovery" or assertion of sovereignty. The so-called doctrine of discovery, if it applied at all, only regulated claims among the European powers and did not in any way diminish the pre-existing sovereignty and rights of Indigenous nations.
3. The 1846 Oregon Boundary Treaty between the United States and Britain only settled

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* The Indigenous Nations Court (INC) is not a real court and this is not an actual appeal. Kent McNeil, the author of this "judgment," is an Emeritus Professor at Osgoode Hall Law School. He is not a judge.

the territorial claims of those nation-states vis-à-vis one another. The Musqueam were governed by their own laws and their treaty relations with other Indigenous peoples, and were not subject to the international law that governed relations between the United States and European nations.

4. Although Canada was eventually able to impose its *de facto* sovereignty on the Musqueam people, to this day the Musqueam have retained the equivalent of *de jure* sovereignty under their own governance structures and laws.

5. This case involves a conflict between Musqueam and Canadian governance and laws in relation to fishing in Musqueam territory. As fish are an essential part of Musqueam culture, with significance far beyond the resource's value as a source of food, it would be inappropriate to apply Canadian law to Mr. Sparrow's fishing activities. While the *Fisheries Act* and Regulations may be designed to manage the resource responsibly and ensure conservation, they do not take account of the cultural and spiritual significance of fish for the Musqueam people. The ceremonies, customs, and laws of the Musqueam are much better suited to this purpose. Accordingly, Musqueam law should take precedence over Canadian law where Musqueam people are harvesting resources within their own territory. As a result, the *Fisheries Act* and Regulations do not apply to Mr. Sparrow and other Musqueam when they are fishing in Musqueam territory.

6. Although the analysis to this point is sufficient to acquit Mr. Sparrow, the Indigenous Nations Court thinks it worthwhile to address the s 35(1) argument as well. This Court agrees with the conclusion of the Court of Appeal and Supreme Court, which is well supported by the evidence, that Mr. Sparrow has an existing Aboriginal right within the meaning of s 35(1) to fish for food, ceremonial, and social purposes, along with all other Musqueam people.

7. However, this Court does not accept the opinion of the lower appeal courts that this right is subject to federal regulation if necessary for the purpose of conservation, except in two situations. As long as the Musqueam have laws that regulate fishing by their members in such a way as to conserve and sustain fish stocks within their territory, they are not subject to Canadian law. However, if the Musqueam cease to have laws regulating fishing by their members, or if the laws they have do not adequately manage and conserve the resource, Canadian law will apply to the extent necessary to conserve the resource. As the Musqueam had laws at the time Mr. Sparrow was fishing that effectively managed and conserved the resource, there is no reason for federal laws regarding fishing to apply to him.

8. In conclusion, both because the Musqueam have retained governance authority over resource harvesting within their territory and because they have a s 35(1) Aboriginal right to fish for food, societal, and ceremonial purposes that is adequately regulated by their own laws, the *Fisheries Act* and Regulations do not apply to them, and therefore Mr. Sparrow must be acquitted.

MCNEIL J:**

1. Overview

[1] This is an appeal to the Indigenous Nations Court by Mr. Ronald Edward Sparrow, a member of the Musqueam (xʷməθkʷəy̓əm) First Nation in the Lower

** Kent McNeil is an Emeritus Professor at Osgoode Hall Law School. He is not a judge.

Mainland of what is now British Columbia, from the decision of the Supreme Court of Canada, *R v Sparrow*, [1990] 1 SCR 1075 [*Sparrow*, SCC]. Mr. Sparrow was charged with fishing in the Fraser River with a drift net longer than permitted by the British Columbia Fishery (General) Regulations, made pursuant to the federal *Fisheries Act*, RSC 1970, c F-1. He was convicted at trial by Provincial Court Judge Goulet (R v Sparrow, unreported, Provincial Court of BC, 20 March 1985, Richmond B.C., #16542C2 [*Sparrow*, PCBC]), whose judgment was affirmed by Lamperson J of the County Court of Vancouver ([1986] BCWLD 599). The British Columbia Court of Appeal set aside the conviction ([1986] BCJ No 1662, [1987] 1 CNLR 145 [*Sparrow*, BCCA]), deciding that Mr. Sparrow has an Aboriginal right to fish for food that is protected by s 35(1) of the *Constitution Act, 1982*, which provides: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." But because the appeal judges held that the right could still be regulated by federal legislation if necessary for conservation and found that the evidence of two experts, Dr. Walters and Dr. Schubert, was contradictory on whether the restriction on the net length was an appropriate conservation measure, they sent the case back to trial so more evidence could be led on this issue. The Supreme Court of Canada agreed, dismissing the appeal and ordering a new trial. The Supreme Court also laid down a test, summarized below, for justifiable infringement of Aboriginal rights that could be applied by lower courts.

[2] Mr. Sparrow contends that he should have been acquitted. He has admitted fishing with a net that exceeded the length permitted by the *Fisheries Act* and Regulations, but has challenged the application of this legislation, as the Musqueam are a sovereign people with their own laws governing fishing. He led evidence at trial to prove that he was fishing within Musqueam territory and asserted that his use of this net was in accordance with Musqueam law. He alleges that Canada and the Musqueam are in a nation-to-nation relationship and they are obliged to respect one another's sovereignty and jurisdiction. This means that Musqueam law, not Canadian law, applies to resource harvesting in the Musqueam territory.

[3] In the alternative, Mr. Sparrow argues that he has an Aboriginal right to fish protected by s 35(1) of the *Constitution Act, 1982.* He contends further that the Musqueam people's Aboriginal right to fish includes authority to make and apply laws governing the right. That authority is held by the Musqueam people as a self-governing entity. Since the Musqueam's law-making authority is constitutionally protected by s 35(1) and the Musqueam have laws governing fishing, federal laws relating to fishing are inapplicable to Musqueam people fishing within their own territory.

[4] The respondent Crown in right of Canada denies that the Musqueam retained sovereignty after colonization of British Columbia by the British and admission of the province into Confederation in 1871. The Crown respectfully agrees with the Supreme Court's opinion in this case that "there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands [Indigenous peoples' traditional lands] vested in the Crown" (*Sparrow*, SCC, para 49). The Crown contends further that the *Constitution Act, 1867* exhaustively distributed legislative and executive powers between the federal and provincial

governments, leaving no room for Indigenous governance authority. As a result, the Musqueam do not have any inherent authority to make or enforce laws in relation to fishing or any other matter. If the Musqueam had laws governing fishing prior to colonization and British Columbia's entry into Canada, those laws have been entirely replaced by federal laws governing fishing in the province. Any law-making authority the Musqueam have in relation to fishing is delegated authority provided by the *Indian Act*, RSC 1985, c I-5, s 81, and applies only on their reserve (*R v Jimmy*, [1987] 3 CNLR 77 (BCCA); *R v Nikal*, [1996] 1 SCR 1013). Although he was fishing in the Musqueam's traditional territory, Mr. Sparrow was not fishing on their reserve.

[5] The Crown accepts the ruling of the Supreme Court that the Musqueam have an Aboriginal right to fish for food, societal, and ceremonial purposes. But despite constitutional recognition and affirmation of this right by s 35(1), the Crown argues that it is not immune from regulation by federal legislation. Relying on the test for justifiable infringement laid down by the Supreme Court in this case, the Crown contends that the *Fisheries Act* and Regulations under which Mr. Sparrow has been charged, if infringing his Aboriginal right to fish, are justifiable in their application to the Musqueam because their purpose is management of the fishery and they are necessary for conservation of the fish stocks. The Crown therefore submits that the conviction of Mr. Sparrow at trial should be upheld.

2. Facts

[6] There is no disagreement over the facts that gave rise to Mr. Sparrow being charged. At trial, Judge Goulet had "no difficulty finding as a fact, that Mr. Sparrow was fishing in ancient tribal territory where his ancestors had fished from time immemorial in that part of the mouth of the Fraser River for salmon" (*Sparrow*, PCBC, page 2). Mr. Sparrow has admitted that he was fishing at the time and place in question, using a drift net that was 45 fathoms in length. This clearly exceeded the 25-fathom maximum length for such nets permitted by the Musqueam Indian food fishing licence issued by the federal government. If the *Fisheries Act* and Regulations apply to Mr. Sparrow when fishing in Musqueam territory, he would have to be found guilty as charged.

[7] Evidence of a Musquean Aboriginal right to fish was presented mainly by Dr. Suttles, an anthropologist called as an expert witness by counsel for Mr. Sparrow. His testimony was summarized by the British Columbia Court of Appeal:

> Dr. Suttles described the special position occupied by the salmon fishery in [Coast Salish] society [of which the Musqueam are a part]. The salmon was not only an important source of food but played an important part in the system of beliefs of the Salish people, and in their ceremonies. The salmon were held to be a race of beings that had, in "myth times", established a bond with human beings requiring the salmon to come each year to give their bodies to the humans who, in turn, treated them with respect shown by performance of the proper ritual. Towards the salmon, as toward other creatures, there was an attitude of caution and respect which resulted in effective conservation of the various species. [*Sparrow*, BCCA, para 18]

[8] The evidence of Dr. Suttles was supported by the "extensive evidence of Musqueam customs and history, and of the band's present reliance on the salmon

fishery," given in cross-examination by Mr. Grant, a former band administrator and member of the Musqueam First Nation who had been called as a witness by the Crown (*Sparrow*, BCCA, para 16). As the evidence of these two witnesses on this point was not contradicted and "[b]ecause the aboriginal right asserted here is a relatively narrow one, the existence of which is not the subject of serious dispute," the Court of Appeal concluded that

> … it is unnecessary to consider the anthropological facts at length. It is clear that the Musqueam have a history as an organized society going back long before the coming of the white man; and that the taking of salmon from the Fraser River was an integral part of their life and has continued to be so to this day. [*Sparrow*, BCCA, para 19]

[9] The Court of Appeal therefore had no difficulty deciding that an Aboriginal right to fish for food, including ceremonial consumption of fish, had been established. The Supreme Court surveyed the evidence on this issue and agreed with this conclusion. We see no reason to disturb these findings. However, this leaves the legal question of whether the Musqueam have governance authority in relation to fishing, and if so whether Musqueam fishing laws take precedence over the *Fisheries Act* and Regulations. We now turn our attention to these matters.

3. Analysis

Question 1. Are the Musqueam a sovereign people with laws in relation to fishing that prevail over Canadian law in Musqueam territory?

[10] To answer this question, we need to briefly examine the history of this part of British Columbia. The undisputed evidence of Dr. Suttles reveals that the Musqueam have inhabited their historical territory in the vicinity of the Fraser River estuary for upwards of 1,500 years. The Musqueam themselves assert that this has been their homeland for thousands of years (online: <https://www.musqueam.bc.ca/>). Europeans came to the Pacific Northwest much more recently. Spanish explorers arrived in the second half of the eighteenth century and possibly earlier. Captain James Cook of the British Admiralty sailed up the West Coast in 1778, stopping at Nootka Sound on the west side of Vancouver Island, but he did not venture into the Strait of Juan de Fuca and so would not have made contact with the Musqueam.

[11] Although Spaniards had explored the Strait of Juan de Fuca and parts of the Salish Sea previously, apparently they first made contact with the Musqueam in 1791 when José María Narváez anchored the *Santa Saturnina* off Point Grey. Narváez was followed a year later by Captain Dionisio Alcalá Galiano of Spain and Captain George Vancouver of Great Britain. On June 4, 1792, Vancouver went ashore at Tulalip in the Puget Sound and claimed sovereignty for the British Crown from 39°20' north latitude to the Strait of Juan de Fuca, and over the Salish Sea (which he named the Gulf of Georgia) and surrounding coast which would have included the Musqueam territory (Barry M. Gough, *The Northwest Coast: British Navigation, Trade, and Discoveries to 1812* (Vancouver: UBC Press, 1992), 157-58).

[12] This claim of sovereignty for the Crown cannot have been effective. Captain Vancouver did not remain on the West Coast and did not attempt to create a colony there or establish British occupation and control. Assessing an argument by counsel for Canada in *Tsilhqot'in Nation v British Columbia*, [2007] BCJ No 2465, [2008]

1 CNLR 112, that Vancouver's formal assertion of sovereignty in 1792 should be accepted as the date of Crown sovereignty, Justice Vickers observed at para 596:

> I am not persuaded that private adventurers or commissioned officers of His Majesty's Royal Navy, even with their best intentions, can to the degree required by international law, assert sovereignty over vast territories by planting a flag and speaking to the utter silence of the mountains and boreal forests. They are, in my view, just words blowing in the wind. I agree entirely with Lambert J.A. when he said in *Delgamuukw* [*v British Columbia*, 104 DLR (4th) 470, [1993] 5 CNLR 1] (B.C.C.A.) at para. 707:
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> > Sovereignty, of course, does not occur when the first sea captain steps ashore with a flag and claims the land for the British Crown. Cook did that in 1778. Sovereignty involves both a measure of settled occupation and a measure of administrative control.

We agree with Vickers J that British sovereignty could not have been acquired by Captains Cook and Vancouver or other British officers merely by proclamation. Sovereignty is both a matter of fact and a matter of law. *De facto* sovereignty requires actual occupation and administrative control, as Lambert JA stated, whereas *de jure* sovereignty depends on the application of a particular body of law. Justice Vickers concluded that the actions of Captain Vancouver would not have been adequate in the international law of the time for *de jure* sovereignty to have been acquired, and Vancouver certainly did not establish *de facto* sovereignty. The Supreme Court of Canada apparently agreed because it seems to have accepted 1846, the year suggested by Vickers J, not the year of Vancouver's voyage, as the time of Crown assertion of sovereignty in British Columbia (*Tsilhqot'in Nation v British Columbia*, [2014] 2 SCR 257, para 60).

[13] We are of the opinion that taking 1846 as the appropriate year is also questionable, even though that was the time accepted by the Supreme Court in *Tsilhqot'in Nation* and *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, para 145. 1846 was the year of the Washington Treaty (also known as the Oregon Boundary Treaty) that set the boundary between the American and British territories in the Pacific Northwest along the 49th parallel from the Rocky Mountains to the Salish Sea. How could an international treaty entered into by two nation-states be binding on any other nation? In particular, how could it determine sovereignty vis-à-vis the Musqueam and other Indigenous peoples in the region who were not part of the international legal system and who did not participate in its formation or consent to its application? International law itself contains a maxim, *pacta tertiis nec nocent nec prosunt* (agreements neither bind nor benefit third parties: Lord McNair, *The Law of Treaties* (Oxford: Clarendon Press, 1961), 309-21), that we regard as applicable in this context. Moreover, in *R v Sioui*, [1990] 1 SCR 1025, decided just one week before *Sparrow*, SCC, Justice Lamer (as he then was) decided for a unanimous Court that the Capitulation of Montreal in 1760 could not have extinguished the treaty rights of the Hurons because "[i]t would be contrary to the general principles of law for an agreement concluded between the English and the French to extinguish a treaty concluded between the English and the Hurons" (para 96). Likewise, an agreement between Britain and the United States could not have extinguished the sovereignty of the Musqueam people.

[14] We also question whether it is appropriate to apply international law at

all in determining sovereignty vis-à-vis the Musqueam and other Indigenous peoples. As *de jure* claims to sovereignty depend on the application of a particular legal system, why rely on a legal system created by Europeans to govern relations among themselves in assessing claims to sovereignty over peoples who are outside that system and who have laws of their own governing their relations with other Indigenous peoples? William Edward Hall, a prominent nineteenth-century international jurist, in his treatise, *International Law* (Oxford: Clarendon Press, 1880), at 34, wrote:

> It is scarcely necessary to point out that as international law is a product of the special civilisation of modern Europe, and forms a highly artificial system of which the principles cannot be supposed to be understood or recognized by countries differently civilised, such states only can be presumed to be subject to it as are the inheritors of that civilisation.

Similarly, in *Worcester v Georgia*, 6 Pet (31 US) 515 (1832), at 544, Chief Justice Marshall decided that the European doctrine of discovery could not apply to the Cherokees and other Indian nations because

> [i]t was an exclusive principle which shut out the right of competition among those who had agreed to it; not one which could annul the previous rights of those [the Indigenous peoples] who had not agreed to it. It regulated the right given by discovery among the European discoverers, but could not affect the rights of those already in possession, either as aboriginal occupants or as occupants by virtue of a discovery made before the memory of man.

So while the Washington Treaty would have settled the territorial claims of the United States and Britain as between themselves and would have been binding on them in international law, that treaty is irrelevant insofar as British claims to sovereignty over the Musqueam and their territory are concerned. Consequently, British sovereignty over them could not have been acquired in 1846 by means of the Washington Treaty.

[15] Regarding *de facto* sovereignty, we acknowledge that the Crown has occupied the province of British Columbia and does exercise effective control there through the Parliament of Canada and the provincial legislature (see *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 SCR 511, where the Crown's *de facto* sovereignty was likewise acknowledged). However, the Musqueam and other Indigenous peoples in British Columbia have also continued to occupy their territories and exercise governmental authority in them (see Felix Hoehn, *Reconciling Sovereignties*: *Aboriginal Nations and Canada* (Saskatoon: University of Saskatchewan Native Law Centre, 2012)). The Musqueam have never entered into a treaty with the Crown, nor has their sovereignty been taken away by conquest (see *Haida Nation* at para 25: the Indigenous peoples "were never conquered"). As the Indigenous Nations Court, we can take judicial notice of the continuing existence of Musqueam governance authority and law, including the domestic law internal to the Musqueam people and the inter-nation law governing their relations with other Indigenous peoples. While we would need the testimony of Elders and other experts to understand the content of these laws, no such evidence is required for us to acknowledge their existence, as no Indigenous societies on Turtle Island (North America) were without the governments and laws necessary for regulating their internal and external affairs (see Catherine Bell and Michael

Asch, *Challenging Assumptions: The Impact of Precedent in Aboriginal Rights Litigation*, in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (Vancouver: UBC Press, 1997), 38 at 64-71). Moreover, although the Musqueam conception of sovereignty may be different from the Euro-Canadian conception, we acknowledge that the Musqueam have a form of *de jure* sovereignty in their domestic law and in the law governing their relations with other Indigenous peoples (see Taiaiake Alfred, "Sovereignty", in Joanne Baker, ed, *Sovereignty Matters: Locations of Contestation and Possibility in Indigenous Struggles for Self-Determination (*Lincoln: University of Nebraska Press, 2005), 33). Their *de jure* sovereignty includes authority to make and enforce laws governing resource harvesting in their territory (see generally John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010)).

[16] So while the Crown may have a degree of *de facto* sovereignty and *de jure* sovereignty in Canadian and international law, Crown sovereignty has not displaced Musqueam sovereignty (see Michael Asch and Patrick Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R. v. Sparrow*" (1991) 29 Alberta L Rev 498). An example of how sovereignty can co-exist in this way is provided by the United States, where the sovereignty of the Indian nations has continued to this day (*Cohen's Handbook of Federal Indian Law,* Nell Jessup Newton, ed (New Providence, NJ: LexisNexis, 2012) at 206-22 (§ 4.01)). As Indigenous and Crown sovereignty co-exist, the question we must resolve in order to decide this case is which prevails in the event of conflict. This is a choice of law issue, though not one to be resolved by application of the rules of private international law (*Beaver v Hill*, 2018 ONCA 816, paras 17-18, application for leave to appeal dismissed, [2019] SCCA No 82). The question to be answered is this: Does Canadian or Musqueam law apply to Musqueam people who are fishing in Musqueam territory? Put this way, we think the answer is obvious. There can be no doubt that the Musqueam, as long as they have existed as an organized society, have had laws governing fishing—laws that respect the fish and ensure conservation so that this vital resource will always sustain the Musqueam people. The evidence in this case supports this conclusion. The testimony of Dr. Suttles confirms that the salmon are an essential part of Musqueam culture and that they have laws regulating fishing. Arthur Pape, counsel for an intervenor, Tribal Councils and Bands, expressed it this way in the Court of Appeal:

> Because of their unique relationship to the fish, Indian people throughout the Pacific Region have regulated their fishing by their own ceremonies, laws and customs, in order to ensure the survival of the renewable resource which they identify as the basis for their own continued survival. [*Sparrow*, BCCA, para 68]

The Court of Appeal confirmed, and we accept, that this "statement of the position is supported by the evidence of Dr. Suttles" (para 69).

[17] Given the continuance of Musqueam governance authority and law, and the fact that fish are an essential part of their culture with significance far beyond the resource's value as a source of food, we conclude that it would be inappropriate to apply Canadian law to Mr. Sparrow's fishing activities. While the *Fisheries Act* and Regulations may be designed to manage the resource responsibly and ensure

conservation, they do not take account of the cultural and spiritual significance of the fish for the Musqueam people. The ceremonies, customs, and laws of the Musqueam are much better suited to this purpose. Accordingly, Musqueam laws should take precedence where Musqueam people are harvesting resources within their own territory.

[18] For these reasons, we conclude that Mr. Sparrow must be acquitted of the charge laid against him.

Question 2: Does Mr. Sparrow have an Aboriginal right to fish protected by s 35(1) of the *Constitution Act, 1982*, rendering the *Fisheries Act* and Regulations inapplicable?

[19] Given our answer to the first question, it is unnecessary to address this question. We nonetheless think it worthwhile to do so in light of the attention paid to it by the Court of Appeal and Supreme Court and the extensive arguments in relation to it made by counsel in this Court.

[20] We have already accepted the conclusion of the Court of Appeal and Supreme Court, which is well supported by the evidence, that Mr. Sparrow has an existing Aboriginal right to fish for food, societal, and ceremonial purposes, along with all other Musqueam people (we say nothing about whether they also have an Aboriginal right to fish for commercial purposes, as that is not an issue in this case). Accordingly, in Canadian law this right was recognized and affirmed, and given constitutional protection, on April 17, 1982, when s 35(1) came into force. The question then is whether the *Fisheries Act* and Regulations can apply to Mr. Sparrow, despite the protection his Aboriginal right enjoys under s 35(1). The answer to this question depends in part on the scope of the Aboriginal right to fish for food, societal, and ceremonial purposes. More specifically, for the purposes of this appeal, it depends on whether the right includes governmental authority over the exercise of the right (see *Beaver v Hill*, *supra*).

[21] We have seen that the Court of Appeal accepted the historical reality, supported by the evidence of Dr. Suttles, that the Indigenous peoples of the Pacific Northwest, the Musqueam among them, "regulated their fishing by their own ceremonies, laws and customs, in order to ensure the survival of the renewable resource which they identify as the basis for their own continued survival" (*Sparrow*, BCCA, paras 68-69). From this, Arthur Pape argued that "regulation of the method of fishing is an inherent aspect of the aboriginal right to fish. If the right is to be kept intact, the regulation must be by the possessors of the right" (*Sparrow*, BCCA, para 69). The Court of Appeal's answer to this contention is as follows:

> In 1982, the Indian right to fish existed in circumstances profoundly different from those prevailing before or in the early years of white settlement when the fishery was thought to be "inexhaustible" (see Dickson J. in *R. v. Jack*, [[1980] 1 SCR 294] at p. 309). The constitutional recognition of the right to fish cannot entail restoring the relationship between Indians and salmon as it existed 150 years ago. The world has changed. The right must now exist in the context of a parliamentary system of government and a federal division of powers. It cannot be defined as if the Musqueam band had continued to be a self-governing entity, or as if its members were not citizens of Canada and residents of British Columbia. Any definition of the existing right must take into account that it exists in the context of an industrial society with all of its complexities and competing interests.

> The "existing right" in 1982 was one which had long been subject to regulation by the federal government. It must continue to be so because only government can regulate with due regard to the interests of all. [*Sparrow*, BCCA, para 74]

[22] The self-regulation argument was presented again in the Supreme Court. Dickson CJ and La Forest J summarized it as follows:

> Counsel for the appellant argued that the effect of s. 35(1) is to deny Parliament's power to restrictively regulate aboriginal fishing rights under s. 91(24) ("Indians and Lands Reserved for the Indians"), and s. 91(12) ("Sea Coast and Inland Fisheries"). The essence of this submission, supported by the intervener, the National Indian Brotherhood/Assembly of First Nations, is that the right to regulate is part of the right to use the resource…. [*Sparrow*, SCC, para 47]

While not addressing this argument as directly as the Court of Appeal, the Supreme Court seems to have accepted that Court's conclusion. Dickson CJ and La Forest J stated:

> The constitutional recognition afforded by the provision [s 35(1)] therefore gives a measure of control over government conduct and a strong check on legislative power. While it does not promise immunity from government regulation in a society that, in the twentieth century, is increasingly more complex, interdependent and sophisticated, and where exhaustible resources need protection and management, it does hold the Crown to a substantive promise. The government is required to bear the burden of justifying any legislation that has some negative effect on any aboriginal right protected under s. 35(1). [*Sparrow*, SCC, para 65]

[23] As already noted, the Supreme Court also opined that "there was from the outset never any doubt that sovereignty and legislative power … vested in the Crown" (*Sparrow*, SCC, para 49). The justices concluded as well that "[f]ederal legislative powers continue [after the coming into force of s 35(1)], including, of course, the right to legislate with respect to Indians pursuant to s. 91(24) of the *Constitution Act, 1867*" (para 62). The difference is that

> [t]hese powers must, however, now be read together with s. 35(1). In other words, federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights. [*Sparrow*, SCC, para 62]

The justifiable infringement test laid down by the Supreme Court requires respect for the Crown's fiduciary relationship with the Indigenous peoples. For infringement of an Aboriginal right to be justified, the Crown must establish a valid legislative objective and demonstrate that the objective is being achieved with as little impairment of the right as possible. Consultation with the Indigenous people involved is also required and, in appropriate circumstances, compensation needs to be paid. For the Supreme Court, application of this test in this case necessitates giving Aboriginal fishing for food, societal, and ceremonial purposes priority over sports and commercial fishing. However, as the continuing existence of the Aboriginal right depends on responsible management and conservation of the resource, legitimate federal regulations that are necessary for conservation may be justifiable even though they infringe the right. As the Court decided that the evidence of infringement and of a conservation justification was inadequate in this instance, it would have sent the case back to trial so that more evidence could be led to address these issues.

[24] With all due respect, we think that neither the Court of Appeal nor the Supreme Court took the contention that the right is self-regulated seriously enough. We understand the concern that an important resource such as the fishery needs to be properly managed and conserved so that it will be available for future generations, Indigenous and non-Indigenous alike. In keeping with Indigenous traditions, we also believe that non-human species have inherent value and need to be respected and protected for their own sake. Where the Musqueam are concerned, this belief is confirmed by the evidence of Dr. Suttles. We have seen that his testimony also demonstrated that the Musqueam have ceremonies, laws, and customs that regulate their fishing so as to respect and conserve the salmon and other species. So the concern that Musqueam fishing would be unregulated if federal fishery laws were not applied is misplaced. Contrary to the opinion of the Court of Appeal, the Musqueam have continued to be self-governing. Their governance authority and laws in relation to fishing have not been displaced by colonization, Confederation, and the division of powers between Parliament and the provincial legislatures by the *Constitution Act, 1867*, as explained by Justice Williamson in relation to the Nisga'a Nation in *Campbell v British Columbia (Attorney-General)*, [2000] 4 CNLR 1 (BCSC). See also Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution* (Ottawa: Minister of Supply and Services Canada, 1993).

[25] Another concern arises from the fact that salmon are a migratory species, and that many Indigenous peoples besides the Musqueam rely on this resource. In the Supreme Court, Dickson CJ and La Forest J observed: "Ninety-one other tribes of Indians, comprising over 20,000 people (compared with 540 Musqueam on the reserve and 100 others off the reserve) obtain their food fish from the Fraser River" (*Sparrow*, SCC, para 26). The Court found this fact to be relevant to the application of the justifiable infringement test: "In trying to show that the restriction is necessary in the circumstances of the Fraser River fishery, the Crown could use facts pertaining to fishing by other Fraser River Indians" (para 87). However, use of the Fraser River fishery by many Indigenous peoples predated European colonization, probably by thousands of years. No doubt each people had its own laws governing fishing, and the various peoples could have entered into agreements among themselves to ensure that fish stocks were maintained, as this would have been in everyone's interest. There is no reason why this cannot happen today. In our opinion, the burden rests squarely on the Crown to prove that Indigenous fishing in the Fraser River is not being adequately regulated to ensure conservation by Indigenous laws, which include both the internal laws of each people and inter-nation laws based on agreements between Indigenous peoples and their customary practices.

[26] So even if the Parliament of Canada does have legislative authority over the Musqueam, s 35(1) of the *Constitution Act, 1982* has severely limited that authority. The Aboriginal rights that are recognized and affirmed by that provision include governance authority over those rights. As a result, Indigenous laws in relation to those rights take precedence over federal and provincial laws. Federal laws that infringe Aboriginal rights to fish, to take the example of the right at stake in this

case, will only apply in one of two instances: first, if the Indigenous people in question does not have current laws regulating fishing by their members, or second, if the laws they have do not adequately manage and conserve the resource. In this case, the existence of Musqueam law in relation to fishing has been established, and the Crown has failed to prove that those laws are inadequate to manage and conserve the resource in the context of fishing by the Musqueam people. For these reasons, in addition to the answer we have provided to question 1, Mr. Sparrow must be acquitted.

4. Answers to the questions before this Court

[27] 1. Are the Musqueam a sovereign people with laws relating to fishing that prevail over Canadian law in Musqueam territory?

Yes. The Musqueam have retained sovereignty over the activities of their members within their territory and have their own laws governing fishing. Those laws prevail over Canadian laws, given the importance of the fishery to the Musqueam as a source of food and as an essential part of their culture.

[28] 2. Does Mr. Sparrow have an Aboriginal right to fish protected by s 35(1) of the *Constitution Act, 1982*, rendering the *Fisheries Act* and Regulations inapplicable?

Yes. While unnecessary to answer this question in light of our response to question 1, we are of the opinion that the existence of Musqueam law in relation to fishing precludes the application of Canadian law in the absence of convincing evidence that Musqueam law does not adequately manage and conserve the resource.

5. Order

This Court orders that Mr. Sparrow be acquitted of the charge laid against him. The Crown is ordered to pay Mr. Sparrow's costs.

Appeal allowed and acquittal entered.